Petition

Office - Supreme Court, U.S.
FILED
OCT 6 1981
ALEXANDER L. STEVAS
CLERK

81-676

No. ..-....

IN THE

Supreme Court of the United States

October Term, 1981

BARRY R. BARBEAU,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF CONTRA COSTA and VICTOR Y. HABIB,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF CONTRA COSTA.

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October 6, 1981

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Question Presented.

1. Whether, within the limitations of the due process clause of the Fourteenth Amendment, petitioner, a Canadian citizen and resident, has by his concededly extraterritorial activities rendered himself amenable to proceedings brought in the State of California?

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SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF CONTRA COSTA and VICTOR Y. HABIB,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF CONTRA COSTA.

Petitioner Barry R. Barbeau ("Barbeau") respectfully prays that a writ of certiorari issue to review the decision of the Superior Court of the State of California, for the County of Contra Costa entered in this proceeding on April 30, 1981.

Opinion Below.

No opinion was rendered either by the Superior Court of the State of California for the County of Contra Costa or by the Court of Appeal of the State of California, First Appellate District. Nor was an opinion rendered by the Supreme Court of California when it denied petitioner's petition for a hearing.

Jurisdiction.

The notice of ruling of the Superior Court of the State of California for the County of Contra Costa denying petitioner's motion to quash service of process was issued on April 30, 1981. A timely petition for writ of mandate was filed with the Court of Appeal of the State of California, First Appellate District. The decision of the Court of Appeal of the State of California, First Appellate District, denying the petition for writ of mandate, was entered on June 9, 1981. A timely petition for hearing in the Supreme Court of California was denied on July 8, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved.

U.S. Const. amend. XIV, § 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Cal. Code of Civ. Proc. § 410.10:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

Statement of the Case.

Respondent Victor Y. Habib ("Habib") brought an action in tort in the Superior Court of the State of California, County of Contra Costa, against petitioner Barbeau and others.[1] Habib contends, *inter alia*, that in the Fall of 1978 Barbeau conspired with the other defendants to bring about Habib's wrongful, forced resignation as an employee of The

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[1]Other defendants in the underlying action include: The Independent Order of Foresters, Ross Edwin Lamberts, Leetate Smith, Churchill Smith, and Does I through XXV, inclusive. None of these defendants has raised a challenge to the exercise of jurisdiction by the California courts.

Independent Order of Foresters (hereinafter "IOF") in Concord, California, then ratified the wrongful acts of other defendants who had precipitated Habib's resignation, and conspired with those other defendants to intentionally cause him severe emotional distress. (Petitioner's Exhibit Volume in Support of Petition for Writ of Mandate in the Court of Appeal, hereinafter "P.E.V.," Exhibit A. 4-5, 8-9, 11-12).

Barbeau, a Marketing Services Officer of IOF, is employed in its home office in Don Mills, Ontario, Canada. He is a citizen and life-long resident of Canada. He has visited California only once in his life, on a short business trip in December of 1978. Barbeau's dealings with Habib were strictly limited to matters arising in the course of the business of his employer, IOF.

In early February 1979, a letter, dated January 29, 1979, from Habib to B.C. Hallum, President of IOF, was referred to Barbeau for a response. In the letter Habib complained about the present circumstances of his employment with IOF and indicated that regrettably he felt compelled to tender his resignation. Barbeau responded to the inquiries in Habib's letter by referring the complaints to IOF personnel in California. He informed Habib of his action by a letter dated February 7, 1979. In a form letter dated February 12, 1979, Barbeau informed Habib of IOF's official acceptance of his resignation. In a final letter to Habib, dated March 7, 1979, Barbeau indicated that, on the basis of reports received from California personnel of the IOF concerning Habib's complaints, he had concluded that such complaints

were unfounded and required no further action.[2] (P.E.V., Exh. C. 1-2).

Barbeau moved in the superior court to quash service of summons on the ground that the court could not properly assert jurisdiction over him. Specifically, he contended that the superior court lacked jurisdiction over his person because he had not been shown to have sufficient contacts with the forum state. (P.E.V., Exh. B. 1, 3-4). Habib conceded in the superior court that Barbeau had engaged in "no act or transaction within California." However, he contended that acts done in California by purported "agents" of Barbeau could suffice as minimum contacts for purposes of an assertion of jurisdiction over Barbeau. (P.E.V., Exh. E. 4).

The superior court, without comment, denied petitioner's motion to quash service of process. (P.E.V., Exh. H. 1). See p. 1 of Appendices hereto. Petitioner then sought a writ of mandate from the court of appeal, pursuant to *Cal. Code of Civ. Proc.* § 418.10(c), to require the superior court to enter an order quashing the service of summons against him. Barbeau and Habib presented their respective petition and answer, and accompanying exhibit volumes, to the Court of Appeal of the State of California, First Appellate District. The Court of Appeal summarily denied Barbeau's petition for a writ of mandate. See p. 2 of Appendices hereto. Bar-

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[2]The parties in their pleadings filed in the superior court, the court of appeal and the Supreme Court of California, differed markedly on the issue of what inferences could be drawn concerning Barbeau's contacts in and with the forum state on the basis of his having written these three letters. Habib contended that the contents of the letters indicate that Barbeau acted in the role of principal vis a vis IOF agents in California and that the acts of IOF agents in California, done at the behest of Barbeau, constitute significant contacts by Barbeau with the state of California. Copies of the Barbeau letters to Habib are included in the appendices to this petition because they appear to be the only tangible evidence of whatever contacts Barbeau may have had in and with California. See pgs. 4-6 of the Appendices hereto.

beau brought a timely petition for hearing, pursuant to *Cal. Rules of Court, Sup. Ct. & Cts. of Appeal*, R. 28, in the Supreme Court of California for a review of the Court of Appeal's decision. This petition was denied by preprinted postcard, without comment, on July 8, 1981. See p. 3 of Appendices hereto.

Petitioner initially raised the federal question which he asks this court to review in the superior court in his notice of motion to quash service of process and memorandum of points and authorities. See p. 7 of Appendices hereto. Petitioner next raised the federal question in the court of appeal in his petition for a writ of mandate with memorandum of points and authorities. See p. 8 of Appendices hereto. Finally, petitioner raised the federal question in the California Supreme Court in his petition for hearing with memorandum of points and authorities. See p. 9 of Appendices hereto.

The Court of Appeal's order denying Barbeau's petition for a writ of mandate and the California Supreme Court's order denying petitioner's petition for a hearing indicate that these courts apparently never ruled on the merits of the petitions. See pgs. 2-3 of Appendices hereto. Accordingly, the instant petition for a writ of certiorari is directed to the Superior Court of the State of California for Contra Costa County, which court is, presumably, the highest court of the forum state that actually ruled on the merits of petitioner's motion.

REASONS FOR GRANTING THE WRIT.

1. Petitioner Lacked Sufficient Minimum Contacts With California to Be Subject to the Jurisdiction of Its Courts.

Respondent Habib conceded in the superior court that petitioner had taken part in "no act or transaction within California," germane to the instant matter. (P.E.V., Exh. E. 4). Accordingly, the only data upon which the state court could have relied to conclude that petitioner had had sufficient contacts with California to permit the court's exercise of jurisdiction over him are the following undisputed facts: 1) Barbeau, while in Canada, admittedly sent three letters on behalf of IOF to Habib which were received by Habib in California;[3] and, 2) Barbeau, on behalf of IOF, contacted another IOF employee, based in California, and requested that he investigate the charges contained in Habib's January 29, 1979 letter to IOF President Hallum.[4] These contacts by the petitioner with California are Constitutionally insuf-

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[3]One of these three letters, the letter of February 12, 1979, was merely a form letter. See p. 5 of Appendices hereto. In this communication the petitioner simply filled in the blanks necessary to acknowledge receipt and acceptance of Habib's resignation from the IOF.

[4]Habib contended in the state courts that Barbeau's letters disclosed the following additional ties to the forum state: 1) "[p]etitioner Barbeau has substantial business interests in California, it being noted that petitioner is the Marketing Services Officer for and including the California Sales Region;" 2) "[p]etitioner Barbeau is in a management position in the IOF whose job concerns the conduct of IOF employees in California and whose job it is to determine whether or not such IOF employees' conduct conforms to California law; and, 3) "[p]etitioner directed an investigation in California on behalf of the IOF and directed said investigation by a resident of California, Leetate Smith." (P.E.V., Exh. C. 3; Answer to Pet. for Writ of Mandate, 12; Answer to Pet. for Hearing, 17-18). Petitioner contended to the state courts, and claims here, that his letters do not support such inferences. Copies of the letters are included in the appendices to this petition to permit this Court to resolve these disputed facts. See pgs. 4-6 of Appendices hereto.

ficient to justify an exercise of jurisdiction over him by the courts of that state.

A person not present within the territory of a forum state must have certain minimum contacts with the forum state in order to be subjected there to a judgment *in personam* that is in compliance with due process. These minimum contacts must be such that maintenance of the suit against him "does not offend 'traditional notions of fair play and substantial justice.' " *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations deleted). A state may not "make binding a judgment *in personam* against an individual . . . with which the state has no contacts, ties, or relations." *Id.* at 319; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980).

Petitioner was not, and is not now, present within the United States of America, much less the State of California. The record established below does not permit the conclusion that he performed any act by which he purposefully availed himself of the privilege of conducting activities within California so as to invoke the benefits and protection of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). He did not do so when he traveled to California in December of 1978 on business. Respondent Habib has implicitly conceded that such was not an act related to the instant controversy.[5] Nor did he do so when, from Canada, he contacted a fellow IOF employee in California and asked him investigate the charges lodged by Habib. And, certainly, petitioner, by the posting of three letters from Canada, including a form letter, designed to reach Habib in California, cannot

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[5]And, this court has declared that it is "the relationship among the defendant, the forum, and *the litigation*, . . . [which is] the central concern of the inquiry into personal jurisdiction." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (emphasis added).

be said to have purposefully availed himself of the privilege of conducting activities within California so as to invoke the benefits and protection of its laws. *Hanson*, 357 U.S. at 253. Moreover, petitioner could not, on the basis of this conduct and by these tenuous connections to California, have "reasonably anticipate[d] being haled into court there." *Woodson*, 444 U.S. at 297.

This court has declared that a forum does not acquire personal jurisdiction over a nonresident individual by being the "center of gravity" or the most convenient location for litigation. The issue of personal jurisdiction must be resolved, "by considering the acts of the . . . [individual]." *Hanson*, 357 U.S. at 254. A consideration of petitioner's acts in relation to California do not sustain the claimed jurisdiction of the California court over him. Maintenance of the suit against petitioner in the California courts, in these circumstances, is offensive to "traditional notions of fair play and substantial justice." *Internat. Shoe Co.*, 326 U.S. at 316. The California court's assertion of jurisdiction over petitioner, a foreign national, is Constitutionally deficient.

2. Tacit Approval of Assertions of State Court Jurisdictions Over Foreign Nationals Who, Like Petitioner, Are Employees of Foreign Companies With Significant Direct Investment in the United States, and Who Obviously Lack Sufficient Minimum Contacts With a State for a Constitutional Assertion of Jurisdiction, Can Adversely Affect the Levels of Foreign Business Activity and Investment in the United States.

The amount of direct foreign investment in industries in the United States has increased dramatically in the past

twenty years.[6] The United States has a recognized interest in increasing the level of foreign investments in the country in order to alleviate the adverse impact on the United States economy generated by continuing unfavorable merchandise trade imbalances with the rest of the world.

In addition, during the past thirty years the level of business activity in the United States conducted by foreign firms (either directly or through United States subsidiaries) has increased enormously. This business activity has created thousands of additional jobs for United States citizens. Increases in the level of direct foreign investments and foreign business activity in the United States tend to foster greater interdependence, understanding and commonality of interest among the peoples and business enterprises of the United States and of foreign nations.

Improper decisions by state courts on jurisdictional challenges raised by foreign nationals, employed by foreign companies which have direct investments or which conduct business in the United States, if uncorrected by this Court, are likely to have an adverse impact on the levels of foreign business activity and direct foreign investment in the United States. This, in turn, could redound against the recognized interests our nation has in maintaining the present levels of, and in cultivating increases in, foreign business activity and investment in the United States.

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[6]Foreign direct investments in American industries increased from $6.91 billion in 1960, to $13.27 billion in 1970, and to $52.26 billion in 1979. Foreign assets in billions of dollars invested in the United States have increased in the following manner:

Year	Foreign Assets in the U.S. (billions of $s)
1950	17.6
1960	40.9
1970	106.8
1975	220.5
1977	310.6
1979	418.2

Statistical Abstract of the United States (101st ed. 1980) 863-64.

The situation of petitioner Barbeau and his employer, the IOF, is instructive in this regard. Petitioner is an employee of a Canadian corporation which has conducted business in the United States since 1891, presently employs approximately 3,500 persons in the United States, has 1,103,000 family memberships in the United States and currently has a direct investment more than of $700,000,000 in the United States. Obviously, there is no question that the California courts have jurisdiction over the IOF. The IOF has availed itself of the privilege of conducting business in California and has invoked the benefits and protections of its laws. However, such is not the case with petitioner. Petitioner's involvement in the dispute which underlies this litigation was *de minimis*.

Petitioner received a complaint in connection with a resignation letter submitted by a California employee of the IOF. He responded to the complaint by contacting another California-based employee of the IOF and by asking this employee to conduct an investigation of the matter and replied to the resignation letter by sending a form letter to the employee telling him that it was accepted and also telling him what was being done concerning his complaint. A few weeks later petitioner, having been advised that Habib's complaint was without merit, sent one additional letter to the former employee. That letter informed Habib that his complaint had been found to be without merit and would, therefore, receive no further consideration. Some months later, petitioner was surprised to find himself sued, in his individual capacity, in a state court in California on the basis of the above-described acts.

The immediate deleterious consequences to the petitioner of being required to defend in such a case were legion: time and costs of obtaining a lawyer, time off from work, costs of possible travel to and lodging in California if he elected

to defend in the action, and other expenses incident to litigation. The likely effects on his work performance are of greater moment for the argument here. The future reaction of such an employee, and of others who are employed in Canada, when requested to perform any act for the IOF that could involve the business of the IOF in the United States, would be to resist doing such an act out of fear that it would subject the employee to suit and liability in a remote forum.

Such reticence on the part of its employees to interact with American citizens could, in short order, undercut the capacity of the IOF to operate effectively in the United States. Very quickly, under a repetition of this pattern of actions, the IOF could find its business activities in the United States unworthy of maintenance.

This would be the case even were the IOF to assume the costs of defending its employees who are haled into court as individual defendants. Such a practice of bankrolling the employees' defenses would undoubtedly calm employee fears. However, the costs of defending such suits for its employees could cause the company to reevaluate the worth of its business activities and its investment position in the United States.

A grant of Barbeau's petition for certiorari and an ultimate declaration by this Court that the requisite minimum contacts were not had for an assertion of jurisdiction over him is warranted. Such actions by this Court in this case will right the wrong done to petitioner. More importantly, they will indicate to other foreign nationals engaged in business interactions with Americans located in the United States that they will not subject themselves to assertions of state court jurisdiction in the United States unless and until they perform "some act by which . . . [they] purposefully avail . . . [themselves] of the privilege of conducting activities

within . . . [a] forum State, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253.

State courts must be put on notice that Constitutionally deficient assertions of jurisdiction over foreign nationals and foreign companies will not be tolerated. The instant petition is a practicable vehicle for this Court to use to accomplish such a purpose.

Foreign business activity and direct investment in the American economy must not be obstructed, nor possibly imperiled, by state court declarations of jurisdiction which "offend 'traditional notions of fair play and substantial justice.' " *Internat. Shoe Co.*, 326 U.S. at 316. Only this Court can prevent such unjustifiable obstructions of, or interference with, foreign business activity in the United States by state courts. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the Court to do no less.

3. Denial of This Petition Will Reinforce the Increasingly Frequent State Court Practice of Summarily and Adversely Disposing of Meritorious Motions and Petitions Questioning Jurisdiction.

This court has a vested interest in insuring that the "minimum contacts" standard developed in *International Shoe* and its progeny is not directly or circuitously disregarded by state courts. A denial of this petition will reinforce the apparent, increasingly frequent state court practice of summarily and adversely disposing of meritorious motions and petitions questioning jurisdiction.[7] The denial of this

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[7]Although there are no published statistics to support this particular assertion, petitioner suggests that state courts, certainly those in California, are developing a most cavalier approach to the question of jurisdiction. Perhaps these courts are doing so on the theory that few defendants against whom such motions are decided will be willing to undergo the expense of seeking redress from this Court, which is, of course, the only Court which can insist that the Constitutional requisites be met.

petition will amount to a condonation of the California courts' apparent indifference to recognized Constitutional restrictions on the exercise of jurisdiction by state courts over nonresident individuals.

State courts in California, trial and appellate, are disposing of all matters presented to them, in increasing frequency, with summary orders.[8] Motions questioning jurisdiction and subsequent petitions concerning the handling of such motions suffer this fate at least as frequently, if not more frequently, than other matters.

One sentence summary dispositions (like the three rendered in this case by the superior court, court of appeal, and California Supreme Court when disposing of petitioner's motion to quash service of process and subsequent petitions), carry with them an unstated assumption. This assumption is that the matter thus disposed of was inconsequential. However, as petitioner's case shows, this assumption is sometimes unwarranted.

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[8]In 1978-79 the California Courts of Appeal considered 1,262 motions comparable to petitioner's petition for a writ of mandate. They disposed of those, either granted or denied them, by written opinions on only forty-six occasions. In 1979-80 the California Courts of Appeal considered 1,322 such motions. They disposed of those, either granted or denied them, by written opinions on only eleven occasions. Comparable figures for the Court of Appeal, First Appellate District, the court which considered Barbeau's motion for a writ of mandate are: 1978-79, fourteen opinions issued in the deciding of 506 motions; 1979-80, one opinion issued in the deciding of 506 motions. *Annual Report of the Administrative Office of the California Courts* [1981], at 159.

In 1978-79 the Supreme Court of California granted hearings in 216 out of the 3,006 cases in which petitions for hearings were filed. In 1979-80 the Supreme Court of California granted hearings in 217 out of the 3,180 cases in which petitions for hearings were filed. *Id.*, at 156. No statistics are kept which break down the petitions for hearing according to substantive area, *e.g.* jurisdictional questions, venue questions, etc. These statistics, although not as comprehensive or particularized as one might like, do provide support for the propositions which petitioner relies on in this argument.

In these circumstances an individual, like petitioner, who has run the gamut of state court proceedings and obtained a series of summary, adverse dispositions of what he considers to be a meritorious jurisdictional claim, is faced with a set of unpalatable choices. He can make a general appearance in the forum state and defend on the merits at great expense and personal inconvenience. Or, he can ignore the proceedings in the forum state, face a default judgment entered against him, and contest enforcement of that judgment in his own nation or state if, and when, enforcement is sought there. Or, he can risk the expense and effort of filing a petition for a certiorari in this Court in a case which on its face — given three summary, adverse dispositions below — is likely to be assumed meritless. A person placed in this position is truly faced with a Hobson's choice.[9]

State courts desiring to maximize their respective jurisdictional limits, when faced with ostensibly meritorious motions or petitions questioning their jurisdiction, can be presumed to be aware of the positive consequences for them of disposing of such matters adversely and summarily. Unfortunately, it behooves such state courts to issue summary adverse orders on meritorious jurisdictional motions or petitions. Doing so obviously takes much less time and effort. These courts know that rendering a summary adverse disposition will increase the burden of a petitioner who considers a further appeal. Furthermore, a summary disposition of a jurisdictional dispute, if actually appealed, more often

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[9]Summary orders by state appellate courts also complicate the drafting of petitions for certiorari. "Without any opinion to work from, the petitioner must reconstruct the relevant factual situation with somewhat more depth and detail than is usually necessary where an adequate summary is available in a lower court opinion." E. Gressman and R. Stearn, *Supreme Court Practice* (5th ed. 1978) 466. Such dispositions make it impossible to determine whether the federal question was considered and decided by the state court.

than a decision on the merits with an opinion, will probably be given a presumption of validity. Finally, such courts appreciate that since summary adverse dispositions are less likely to be appealed, the court's implicit, possibly unconstitutional, maximization of its jurisdictional prerogatives is less likely to be invalidated.

If this Court summarily denies petitions for certiorari such as the within petition, it will implicitly endorse this questionable behavior by state courts. This Court should not, however, condone the state courts' mishandling of Barbeau's jurisdictional challenge by denying his petition for certiorari. Doing so, when the "minimum contacts" necessary for an assertion of jurisdiction are so obviously lacking, will make specious the claim for petitioner and others like him, that, "[t]he Due Process Clause, by ensuring the 'orderly administration of the laws,' . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Woodson*, 444 U.S. at 297. The Court has a duty to ensure that state courts do not willfully, or inadvertently, circumvent the requirements of the Due Process Clause in their assertions of jurisdiction.

If, instead, this Court grants this petition and reviews it, along with others brought in similar circumstances, to determine the extent of state court compliance with the strictures of due process in the jurisdictional realm, it will put state courts on notice that the standard first set forth in *International Shoe*, and thereafter reaffirmed, cannot be sidestepped by summary adverse dispositions. State courts then will begin to look more closely at meritorious jurisdictional challenges, begin to render proper "minimum con-

tacts" analyses in such matters, and begin to take explicit positions on these questions. In this way the "orderly administration of the laws" will be furthered, if not ensured.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and order of the Superior Court of the State of California, for the County of Contra Costa.

Dated: October 6, 1981.

Respectfully submitted,

CHARLES GRIFFIN CALE,
LOYD P. DERBY,
KENNETH B. WRIGHT,
STEPHEN M. LOWRY,
Counsel for Petitioner.

Of Counsel:
MORGAN, LEWIS & BOCKIUS.

APPENDIX 1.

Notice of Ruling.

In the Superior Court of the State of California in and for the County of Contra Costa.

Victor Y. Habib, Plaintiff, vs. The Independent Order of Foresters, *et al.*, Defendants.

Dept. 10, No. 201436. William R. Channell, Judge.

Filed: April 30, 1981.

Motion by defendant Barry R. Barbeau to Quash Service of Process having heretofore been submitted to the Court,

The Court orders that said motion is denied.

Dated: April 30, 1981.

J. R. OLSSON, Clerk
By /s/ L. Crowe
L. Crowe
Deputy.

APPENDIX 2.

Judgment and Order.

Court of Appeal of the State of California in and for the First Appellate District Division Two.

Barry R. Barbeau, Petitioner, vs. Superior Court of the State of California for the County of Contra Costa, Respondent, Victor Y. Habib, Real Party in Interest.

No. 52735. Contra Costa Superior Court No. 201436.

Filed: June 9, 1981.

BY THE COURT:

The petition for writ of mandate is denied.

Dated _____

ROUSE, J., Acting P.J.

APPENDIX 3.

Order.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
San Francisco, California 94102
JULY 9, 1981

I have this day filed Order

HEARING DENIED.

In re: 1 CIV. *No.* 52735, Barbeau *vs.* Sup. Ct.

Respectfully,

Clerk

APPENDIX 4.

Petitioner Barbeau's Letters to Respondent Habib.

February 7, 1979

Mr. Victor Habib
1033 Holly Street
Alameda, California 94501

Dear Mr. Habib:

Your January 29, 1979 letter to Mr. B.C. Hallum has been directed to my attention.

This correspondence is being treated as your official resignation request and we are proceding accordingly. Your pension contributions and interest will be refunded to you in due course.

The pension contributions made during your first period of employment were applied to your commission account to offset the large debit in your commission account. A copy of Mr. Watson's reply to your inquiry is enclosed.

The contributions made during your second period of employment are being refunded.

Your letter contains numerous complaints against Mr. Lamberts and Mr. Churchill Smith and I am referring these complaints to Mr. Leetate Smith for investigation.

Yours truly,

Barry R. Barbeau
Marketing Services Officer

BRB/bl

Enclosure

cc Leetate Smith

[letterhead]

February 12, 1979

Mr. Victor Y. Habib
3051 Treat Blvd. #12
Concord, California
U.S.A. 94518

Dear Mr. Habib:

Receipt of your resignation notice dated January 29, 1979 is hereby acknowledged.

Your Employment Agreement with The Independent Order of Foresters dated January 1, 1977 is terminated effective as of February 12, 1979 in accordance with the terms thereof.

Yours Truly,

Barry R. Barbeau
Marketing Services Officer
/cc
cc—M. Lamberta 3163
M. Smith 3223

March 7, 1979

Mr. Victor Y. Habib
3051 Treat Blvd. #120
Concord, California
94518

Dear Mr. Habib:

I have received a report from Mr. Leetate Smith with regard to the complaints raised in your letter.

The contents of the report leaves me with no alternative but to close my file as I am satisfied your complaints are unwarranted and I see no justification to pursue the matter further.

Yours truly,

Barry R. Barbeau
Marketing Services Officer

BRB/bl

APPENDIX 5.

Portions of Pages 4-5 of Petitioner Barbeau's Memorandum of Points and Authorities in Support of His Motion to Quash Service of Process in the Superior Court.

1. Plaintiff Has The Burden of Establishing Sufficient Contact Between The Defendant And The Forum To Satisfy Due Process

"To establish personal jurisdiction over a defendant not personally present within the forum, a plaintiff is required to show that the defendant against whom jurisdiction is asserted had had 'minimum contacts' with the forum such that the maintenance of the suit will not offend 'traditional notions of fair play and substantial justice.' *International Shoe Company v. Washington*, 326 U.S. 210 [sic], 316 (1945) . . .

Of course, the mere fact that a person has been properly served does not give the Court jurisdiction over him. *Instead, the exercise of jurisdiction is required to comport with Federal due process as established by International Shoe and later cases.* (Emphasis added).

APPENDIX 6.

Portions of Pages 10-12 of Petitioner Barbeau's Memorandum of Points and Authorities in Support of His Petition for Writ of Mandate in the Court of Appeal.

C. FOR RESPONDENT COURT TO EXERCISE PERSONAL JURISDICTION OVER PETITIONER CONSISTENTLY WITH THE FIFTH AND FOURTEENTH AMENDMENTS, HE MUST HAVE HAD "MINIMAL CONTACTS" WITH THIS STATE.

* * * *

"The due process clause of the Fifth Amendment of the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, requires that "in order to subject a defendant to a judgment *in personam*, certain minimum contacts" within the territory of the forum must be shown so that the maintenance of the suit does not "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

As was succinctly stated by the Supreme Court of the United States in *Hanson v. Denckla*, 357 U.S. 235 at 251:

> "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the '*minimal contacts*' with that state that are a *prerequisite to its exercise of power over him.*" (Emphasis in petitioner's original).

APPENDIX 7.

Portions of Pages 7-9 of Petitioner Barbeau's Memorandum of Points and Authorities in Support of His Petition for a Hearing in the Supreme Court of California.

1. *RESPONDENT COURT* [the Superior Court of the State of California for the County of Contra Costa] *LACKS IN PERSONAM JURISDICTION OVER PETITIONER.*

Jurisdiction of California courts is set forth in *California Code of Civil Procedure*, Section 410.10. The Section provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

Such statutory limitations upon personal jurisdiction are 'coextensive with the other limits of due process' under the state and federal constitutions, as those limits have been defined by the United States Supreme Court . . . .

The United States Supreme Court has attempted to define the due process limitations upon state power to exercise personal jurisdiction over out-of-state defendants in a line of cases beginning with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). These cases hold that if a defendant is not present within the forum, the due process clause of the United States Constitution requires that he have certain 'minimum contacts' with the forum state before a judgment can be rendered against him. Specifically, the forum state may not exercise jurisdiction over a nonresident unless his relationship to the state is such as to make the exercise of such jurisdiction reasonable, *International Shoe, supra* at 320, and the maintenance of the suit must not offend 'traditional notions of fair play and substantial justice.' *International Shoe, supra* at 316." (Citations deleted.)

Opposition

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No. 81-676

In the Supreme Court of the United States

October Term, 1981

BARRY R. BARBEAU,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF CONTRA COSTA and VICTOR Y. HABIB,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF CONTRA COSTA

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent

November, 1981

INTER-CITY PRINTING COMPANY, OAKLAND, CALIFORNIA 94607

QUESTIONS PRESENTED

1. Has petitioner's' contacts with California, and acts performed by his agent in California, supplied "minimum contacts" requisite to render Petitioner amenable to proceedings in the Forum state.

2. What are the fair factual inferences to be taken from three letters sent by Petitioner, in Canada, to Respondent in California, and do these factual inferences constitute sufficient "minimum contacts" to support in personam jurisdiction over petitioner.

No. 81-676

In the Supreme Court of the United States

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BARRY R. BARBEAU,
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vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF CONTRA COSTA and VICTOR Y. HABIB,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF CONTRA COSTA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Victor Y. Habib, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the decision of the Superior Court of the State of California, for the County of Contra Costa entered in this proceeding on April 30, 1981.

FORWARD

This is a case where respondent's counsel probably should have provided the clerk of this court a statement that this case clearly does not warrant review by this court and thereby waive the right to file a brief in opposition. However, certain factual omissions in Petitioner's brief require addition in order that the decisions of the California courts be understood.

STATEMENT OF THE CASE

In this case Respondent, Victor Y. Habib, "Habib", sought in personam jurisdiction over Petitioner "Barbeau", on the basis of certain acts which Barbeau performed and acts which he had performed for him by his agent in California. Habib contends that these acts constituted "minimum contacts" sufficient to *In Personam* jurisdiction over Petitioner.

Habib's main cause of action against Barbeau and the other co-defendants is based upon *Tamany* v. *Atlantic Richfield* (1980) 27 C. 3d. 167. In *Tamany*, the California Supreme Court held that an employee can recover by way of tort, both general *and* punitive damages against an employer who terminates an employee for the employee's refusal to engage in unlawful activity. In the case at bar, Habib, an insurance salesman and assistant manager for the Independent Order of Foresters (hereinafter IOF), refused to endorse insurance applications obtained by unlicensed

insurance sales personnel and refused to split commissions with unlicensed personnel. Said conduct was and is prohibited under California law. For Habib's refusal to engage in such illegal conduct, he was first terminated from his position as Assistant Manager and then subsequently "frozen out" as an insurance agent, thereby effectively terminated from Employment by defendants.

Habib had been an employee of the IOF for a total of five years and a resident of California for over twenty years. (See Habib's declaration, appendix one). At the time of Habib's termination, Habib was an assistant manager of the Concord-Oakland, office located in Concord, California. Petitioner's co-defendant, Ross Lamberts, became the new manager of the office in September 1978, and announced to Habib and others that there were "new policies". According to co-defendant Ross Lamberts, Assistant Managers were to endorse insurance policies solicited by unlicensed personnel and to split commissions with unlicensed personnel. (See Habib's declaration appendix one). Habib refused to engage in such illegal conduct because it was against California law. (See Habib's declaration appendix one). Habib was immediately terminated as an Assistant Manager and was demoted to salesman. (See Habib's declaration appendix one). After this demotion Habib gathered copies of insurance applications solicited by unlicensed personnel and submitted the copies to the California

Department of Insurance for their investigation and prosecution. (See Habib's declaration appendix one). Habib took this action even though co-defendant Churchill Smith warned Habib that if Habib took the insurance applications to the Department of Insurance that Habib would never have a job in the insurance industry again. (See Habib's declaration appendix one). Thereafter Habib was frozen out of the IOF by various methods including the interception of his telephone messages and by being banned from the use of the Concord-Oakland office, Habib's only work location. As a result of his being frozen out, Habib was forced to resign. This was accomplished by Habib's letter to President B. C. Hallum dated January 29, 1979. (See Habib's letter January 29, 1979 as appendix two). In this letter of January 29, 1979 to the president, Habib voiced his complaints as to the illegal conduct of defendants Ross Lamberts and Churchill Smith. Habib's letter was referred to petitioner herein, Barry R. Barbeau. Barbeau responded in pertinent part as follows: "Your letter contains numerous complaints against Mr. Lamberts and Mr. Churchill Smith and I am referring these complaints to Mr. Leetate Smith for investigation." Leetate Smith, a co-defendant herein, the purported investigator, *is the brother of Churchill Smith* and Barbeau knew this to be the case at the time Barbeau ordered Leetate to investigate his own brother Churchill. (See Habib's declaration appendix one). One month later, March 7, 1979, petitioner wrote to Habib explaining

"I have received a report" from Leetate Smith and that Habib's allegations of wrongdoing were "unwarranted". Given petitioners knowledge of the familial relationship between Leetate and Churchill Smith, Habib concluded that Barbeau had conducted a sham investigation from his office in Canada by the use of his agent in California, Leetate Smith, and that Barbeau was intimately involved in a conspiracy to cover up the illegal acts commited against Habib. (See Habib's declaration appendix one).

REASON WHY THE WRIT SHOULD BE DENIED

1. The decision of the California Courts correctly decided the issue of minimum contacts.

Petitioner Barbeau does not contest that a foreign national is subject to *in personam* jurisdiction for acts committed by his agents in the forum state. This case involves a single narrow *factual* question, there being no real dispute on the law. Did the California courts correctly weigh the facts of this case in applying the settled Constitutional standard, that before State Courts may exercise *in personam* jurisdiction over a non-resident, it must appear that the non-resident has certain "minimum contacts" such as the maintenance of the suit does not offend traditional notions of fair play and substantial justice? *International Shoe* v. *Washington*, 326 U.S. 310.

Petitioner admits in his footnotes at page 4 number 2 and at page 6 number 3 that the sum total of the dispute concerning *in personam* jurisdiction reduces itself to what proper inferences must be drawn from the letters written by Barbeau to Habib. The fair inferences taken from Barbeau's letters viewed in conjunction with the facts of this case must be construed as follows:

1. Barbeau's original letter of February 7, 1979 demonstrates Barbeau's apparent authority in the I. O. F. organization to handle complaints of illegal acts taking place in California by I. O. F. employees and that his job involves the determination as to whether or not conduct by I. O. F. employees is lawful.

2. By virtue of Barbeau's direction to Leetate Smith that Smith was to investigate an occurrence in California it is reasonably inferred that Barbeau had authority to appoint agents to investigate acts in California and that such authority was in fact exercised.

3. Barbeau's investigator, Leetate Smith, reporting back to Barbeau (evidenced by Barbeau's letter of March 7, 1979), demonstrates in fact that Leetate Smith was Barbeau's agent inasmuch as Leetate Smith reported to Barbeau at Barbeau's direction.

4. Leetate Smith's reporting to Barbeau demonstrates that Barbeau was conducting an investigation in California through his agent, Leetate Smith.

5. The culmination of Barbeau's own acts disclosed by his own letters demonstrate that his job as "Marketing Service Officer" extends to the state of California.

6. Barbeau's letters demonstrate that from reports made by others in California, Barbeau had authority for "pursuit" from Barbeau's office in Canada.

7. Finally, the fact that Barbeau knew that he was sending one brother, Leetate Smith, to investigate charges against Churchill Smith, Leetate's brother, strongly indicates that Barbeau was fully involved in the conspiracy against Habib and therefore a party to the underlying wrongful termination.

In face of all of the above contacts to the state of California it is incredible that Barbeau calls his involvement "de minimis". Barbeau's statement that his letters do not support such inferences is supported no where in his brief. This omission must clearly tell the court that even Barbeau cannot explain away the contacts that are only too plain from the face of Barbeau's fateful letters.

The summation of Barbeau's contacts to California and to this litigation render maintenance of in personam jurisdiction over Barbeau especially fair and reasonable and does not offend traditional notions of fair play and substantial justice.

Barbeau's other extraneous arguments are irrelevant and shall therefore not be discussed.

CONCLUSION

For the above reason, a writ of certiorari should be denied.

Dated: December 4, 1981.

THOMAS L. BLOXHAM
Counsel for Respondent

APPENDIX

APPENDIX I

THOMAS L. BLOXHAM
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Attorney for Plaintiff

Superior Court of the State of California

For the County of Contra Costa

VICTOR Y. HABIB, *Plaintiff*, v. THE INDEPENDENT ORDER OF FORESTERS, ROSS LAMBERTS, CHURCHILL SMITH, BARRY BARBEAU, and DOES I-XXV, *Defendants.*	No. 201436 DECLARATION OF VICTOR Y. HABIB

I, Victor Y. Habib, declare under penalty of perjury as follows:

1. I am a resident of California and have been such for over twenty years.

2. Up until September, 1978, I was employed as an assistant manager with the Independent Order of Foresters in the Concord office. Prior to the complained

of acts, I had been an employee of the Independent Order of Foresters for a total of five years.

3. On or about September of 1978, defendant Ross Lamberts became the new manager of the Concord office and announced to other assistant managers and myself that there would be new policies. Ross Lamberts directed me to endorse insurance policies solicited by unlicensed insurance agents and to split insurance commissions with unlicensed insurance personnel. I refused to engage in such conduct because said conduct is prohibited by California law. Defendant Ross Lamberts told me that unless I engaged in such illegal conduct, I would be terminated. I refused to engage in such conduct and thereafter I was terminated from my position as assistant manager and was demoted to the position of insurance salesman. Thereafter I gathered copies of insurance applications solicited by unlicensed personnel and submitted said copies to the California Department of Insurance for their investigation and prosecution. At or about this time, defendant Ross Lamberts began having my telephone and other messages intercepted away from me and in addition, directed my insurance leads to other agents in the office. Even though I was an agent of the Independent Order of Foresters at that time, I was not allowed in the office to conduct business and I was not allowed to occupy my desk space. In addition to the above, I was threatened by defendant Churchill Smith that if I brought my complaints to the Department of

Insurance that I would never have a job in the insurance industry again.

4. On January 29, 1979, I wrote to the President of the Independent Order of Foresters, B. C. Hallum. This letter is attached hereto. In this letter I explained to the President what had occurred. Subsequently, I received defendant Barbeau's letter of February 7, 1979, attached to defendant Barbeau's herein. In that letter, defendant Barbeau explains that my complaints regarding Churchill Smith were referred to Mr. Leetate Smith for investigation. Churchill and Leetate Smith are brothers and known to be so by defendant Barbeau.

5. My receipt of defendant Barbeau's letter dated March 7, 1979, attached to defendant Barbeau's affidavit, reflects defendant Barbeau's ostensive conclusion that based on defendant Leetate Smith's investigation of his own brother, Churchill Smith, defendant Barbeau was satisfied no impropriety took place. On this basis, I have concluded that no real investigation ever took place by the Independent Order of Foresters or by defendant Barbeau, and instead, defendant Barbeau attempted to cover-up illegal activity of the above-mentioned persons in the company management and thereby condoning and ratifying said conduct on behalf of the Independent Order of Foresters.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this ..... day of April, 1981, at Concord, California.

VICTOR Y. HABIB

APPENDIX II

The **INDEPENDENT** Order of **FORESTERS**
[LETTERHEAD I. O. F.]

Dated: Jan. 29, 1979

To: Mr. B. C. Hallum
President of
Independent Order
of Foresters

From: Victor Habib
1033 Holly St.
Alameda, CA 94504
Deputy #40642
Office 3102

Dear Mr. Hallum,

It is with great regret that I write this letter, for after five years of devoted and loyal service, I am forced to resign. I do feel you should know why!

It all started in September of 1978 when our manager Ruben Torres stepped down and we were presented with a new manager, a Mr. Ross Lamberts from the Santa Ana office.

Mr. Lamberts then started to tell us that things were going to be different and we would do things his way. Listed below are some of the things he required sub-managers to do.

1.) Tell all new deputy there was a $69.00 state fee, they must pay to start work.

1.a.) There is only a $20.00 state fee and a six

dollar social membership. The extra $43.00 was going into Mr. Lamberts pocket.

Not only is this immoral but it is also fraud.

2.) Mr. Lamberts then told us that we were to send out new deputys into the field before they were liscened by the state.

2.a.) It is against the laws of the state insurance commissioner of California to do so, and a deputy, can lose or get his liscence suspended.

I strongly protested these acts to my manager Mr. Lamberts. Mr. Lamberts reply was: you either do it or be demoted to a deputy. (I was an assistant manger) I chose to be demoted rather than to commit fraud or go against the Laws of the State insurance commissioner.

I then appealed to our regional manager Mr. Churchill Smith. I was able to obtain proof that Mr. Lamberts was breaking the Law. Mr. Churchill Smith began screaming at me on the speaker-phone and threatened me that if I did not give Mr. Lamberts the Illegal papers he would see to it that I would not have a job for four or five years. I also have proof Mr. Smith threatened me as three people heard him.

Now I ask you Mr Halum, is this a fraternal organization or a fraternal Mafia.

Listed below are a few other things this Mr. Lamberts does.

1.) Demands fraternal activity sheets be turned in with every application signed by the new member. He keeps the members signature on file so in the future he can forge it if he needs to. (he told me this.) (and others.)

2.) He is trying to charge $40.00 monthly for office expenses per deputy, yet office expenses are paid by Home Office. Office expenses are to include phone rent etc.

3.) He has on several occassions held not only my pay checks but other deputys pay checks and claims they have not come in or were lost. I have seen renewal checks come in, yet he says they haven't. I'm not asking him to give me something I haven't earned.

4.) He told me we received no christmas present (cheese) from Head Office, yet I found others received cheese. When I questioned him he said: B. C. blew it this year! That christmas present was addressed to me, not Lamberts. Thats mail fraud.

I could go on and I have proof of all this. I am forced to leave my Job because I am Honest. I was demoted because I refused to break Laws and commit fraud. I have received many awards, one from you personally—(Supervisor of the year.)

Since the only way for me to continue working for the I. O. F. is to do illegal acts then I am forced to quit.

I have lost thousands of dollars in the past five months because of the tremedous pressure that was put on me. I was not permitted in the office because Mr. Lamberts was afraid I would tell other deputys what was going on. How is a deputy to work when he has no access to files and records.

At this time I am requesting the immediate realease of my Pension along with all intrest and accumalted investment income.

Also, in 1975 I was to receive $389.02 plus intrest and accumalted investment income. This was money that I put in from my checks. Yet it was never released to me. I have ask for this money before and will ask for it one last time. This was my money and my property, not the property of the I. O.F.

It is very unfortunate that all this has happened, but when people threaten others in order to achieve a goal—whether legal or not then I feel sorry for them.

If the Independent order of Foresters gets rid of the few people who feel they can muscle others because of their wealth then let me know because I was a loyal and honest deputy.

Fraternally,

Vic Habib